Lew Thai v Chai Yee Chong

HIGH COURT (IPOH) — CIVIL SUIT NO P-1107 OF 1983
PEH SWEE CHIN FCJ
12 SEPTEMBER 1996

Labour Law *— Social security — Claim against co-employee — Action filed before 20 February 1992 — Whether claim barred by s 42 Employees Social Security Act 1969 — Employees' Social Security Act 1969 s 42 — Employees' Social Security (Amendment) Act 1992*

Tort *— Negligence — Accident at work — Duty of co-employee — Negligent omission of co-employee — Whether there is a special relationship between co-employees — Whether mine manager has a duty to act affirmatively to protect his co-employee from injury or damage — Standard of the duty of care imposed by law on a co-employee*

Words and Phrases *— 'Any other written law' — Employees' Social Security Act 1969 s 42*

The plaintiff was a worker at a tin mine ('the mine'). He was instructed by the defendant, a co-worker, to build an embankment to prevent rising water from flooding the mine when the mine wall subsequently collapsed resulting in serious injuries to the plaintiff. The plaintiff claimed, inter alia, that the failure of the defendant to take any or adequate precautions for the safety of the plaintiff or to stop the plaintiff from working under such dangerous situation amounted to negligence. It was also submitted that the defendant was negligent in instructing the plaintiff to build the bund with a tractor when the defendant knew or ought to have known the impending landslip or caving in of the mining wall.

The defendant submitted by way of defence, that the plaintiff, being an insured employee under the Employees' Social Security Act 1969 ('the Act'), was barred by s 42 from claiming damages. It was also submitted that the defendant had not breached the duty of care in this case, for the plaintiff had to take risks which were part and parcel of the job of a mine worker. The defendant further contended that the defendant could not be expected to stop the workers from working that night as there was no dangerous situation, the heavy rain and a bund made of sand would not present a dangerous situation.

Held, allowing the plaintiff's claim:

(1) Section 42 of the Act does bar an employee from claiming against his employer. However in the present situation, the plaintiff was not claiming against his employer but against a fellow employee. If he claims against his employer, undoubtedly such claim would be indeed barred by the Act. A claim against a fellow employee before the coming into force of the Employees'

Social Security (Amendment) Act 1992 (wef 20 February 1992) — as in this case — is not barred by the Act (see pp 771I and 772A–B); *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269 followed.

(2) In negligence, the general duty of care is that one must take care not to cause injury or damage to one's neighbour. On the other hand, the law does not impose a general duty of care to save the neighbour from such injury or damage for which one is not responsible, except when there is a special relationship between the parties, where the law will impose such a duty of care in regard to such failure or neglect to save one's neighbour from injury or damage even where one is not responsible for such injury and damage to the neighbour. When such special relationship arises, the law will impose a duty of care of a special kind, it being a duty to act affirmatively to protect the neighbour or plaintiff from such injury or damage. In regard to the standard of the duty of care imposed by law on a defendant in connection with the duty to protect the plaintiff from such actionable omission, it is equivalent to or is demonstrated by what the plaintiff has to prove, either that: (a) the thing the defendant did not do was a thing commonly done by other persons in like circumstances; or (b) it was a thing which was so obviously wanted that it would be a folly in anyone to neglect to provide it.

Facts in this case would naturally constitute the situation that gave rise to a special relationship between the plaintiff and the defendant. The plaintiff — being under the control of the defendant, the mine manager — had to be on duty at the mine that night and was in a position that was foreseeable that he might be injured. Further, the defendant had failed to take the precaution in the following ways: (a) by failing to ask the plaintiff to stop work; and (b) by failing to tell the plaintiff not to drive a tractor there to raise the height of the bund over which flood water flowed, in view of the conditions of great danger prevailing that night. Such specified precaution 'was a thing which was so obviously wanted that it would be a folly' for the defendant to neglect to provide such precaution. Therefore, the defendant was liable. Since contributory negligence was not pleaded, the defendant would be wholly liable (see pp 772F–I, 773A–G and 774F–H); *Morton v Wiliam Dixon Ltd* (1909) CS 807, *Paris v Stepney Borough Council* [1951] AC 367 and *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 followed.

(3) Common law, being unwritten law, does not fall within the words 'any other written law' as provided in s 42 of the Act. Therefore, the claim for special damages at common law by the plaintiff was not a similar benefit under 'any other written law' within the meaning of s 42 and thus the claim was sustainable despite s 42 (see p 775D–G).

[**Bahasa Malaysia summary**

Plaintif adalah seorang pekerja di lombong timah ('lombong tersebut'). Dia telah diarahkan oleh defendan, seorang rakan sejawat, supaya membina sebuah empangan untuk menyekat air yang makin naik daripada membanjiri lombong tersebut apabila dinding lombong tersebut runtuh dan mengakibatkan kecederaan yang serius kepada plaintif. Plaintif menuntut, antara lain, bahawa kegagalan defendan dalam mengambil sebarang langkah berjaga atau yang wajar untuk keselamatan plaintif atau untuk menahan plaintif daripada bekerja di bawah keadaan bahaya demikian sama seperti kecuaian. Adalah juga dihujahkan bahawa defendan cuai dalam mengarahkan plaintif membina permatang dengan traktor walhal defendan tahu atau sepatutnya tahu tentang gelinciran tanah atau keruntuhan dinding yang akan melanda lombong tersebut.

Sebagai pembelaan, defendan menghujahkan bahawa plaintif, yang merupakan seorang pekerja yang diinsuranskan di bawah Akta Keselamatan Sosial Pekerja 1969 ('Akta tersebut'), dihalang oleh s 42 daripada menuntut ganti rugi. Adalah juga dihujahkan bahawa defendan telah tidak melanggar kewajipan berjaga-jaga dalam kes ini kerana plaintif terpaksa mengambil risiko yang merupakan sebahagian pekerjaan seorang pekerja lombong. Defendan seterusnya berhujah bahawa defendan tidak boleh dijangka menahan pekerja daripada bekerja pada malam itu disebabkan tiada keadaan yang bahaya, hujan lebat dan sebuah permatang yang dibuat daripada tanah tidak membangkitkan keadaan yang bahaya.

Diputuskan, membenarkan tuntutan plaintif:

(1) Seksyen 42 Akta tersebut memang menghalang seseorang pekerja daripada membuat tuntutan terhadap majikannya. Namun demikian dalam keadaan ini, plaintif tidak menuntut terhadap majikan tetapi terhadap rakan sejawat. Sekiranya dia menuntut terhadap majikannya, sudah tentu tuntutan demikian akan terhalang oleh Akta tersebut. Tuntutan terhadap seorang rakan sejawat sebelum Akta Keselamatan Sosial Pekerja (Pindaan) 1992 berkuatkuasa (mulai 20 Februari 1992) — seperti dalam kes ini — tidak terhalang oleh Akta tersebut (lihat ms 771I dan 772A–B); *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269 diikut.

(2) Dalam kecuaian, kewajipan berjaga-jaga yang am adalah bahawa seseorang mestilah berjaga-jaga untuk tidak mencederakan atau menyebabkan kerosakan kepada jirannya. Sebaliknya, undang-undang tidak mengenakan kewajipan berjaga-jaga am untuk melindungi jiran daripada kecederaan atau kerosakan yang ia tidak bertanggungjawab, kecuali di mana terdapat perhubungan yang khas antara pihak-pihak, di mana undang-undang akan mengenakan kewajipan sedemikian berkaitan dengan kegagalan atau kecuaian begitu untuk menyelamatkan jiran daripada kecederaan atau kerosakan sekalipun ia tidak bertanggungjawab

atas kecederaan atau kerosakan kepada jiran. Apabila perhubungan begitu berbangkit, undang-undang akan mengenakan suatu kewajipan berjaga-jaga yang khusus, kerana ia merupakan kewajipan untuk bertindak secara positif bagi melindungi jiran atau plaintif daripada kecederaan atau kerosakan demikian. Berkenaan darjah kewajipan berjaga-jaga yang dikenakan oleh mahkamah ke atas defendan berkaitan dengan kewajipan untuk melindungi plaintif daripada peninggalan yang boleh didakwa demikian, ia adalah sama dengan atau ditunjukkan oleh apa yang harus dibuktikan oleh plaintif iaitu sama ada bahawa: (a) apa yang tidak dilakukan oleh defendan adalah perkara yang biasa dilakukan oleh orang lain dalam keadaan yang serupa; atau (b) ia adalah suatu perbuatan yang begitu diperlukan bahawa barang siapa yang tidak melakukannya adalah cuai.

Fakta-fakta dalam kes ini sudah tentu membentuk keadaan yang menimbulkan suatu perhubungan khas di antara plaintif dan defendan. Plaintif — yang berada di bawah kawalan defendan, pengurus lombong tersebut — terpaksa bertugas di lombong tersebut pada malam itu dan berada dalam kedudukan yang dapat dijangka bahawa dia akan mengalami kecederaan. Selanjutnya, defendan telah gagal berwaspada dalam cara-cara yang berikut: (a) kegagalan untuk meminta plaintif berhenti kerja; dan (b) kegagalan memberitahu plaintif supaya tidak memandu traktor ke sana untuk meninggikan paras permatang yang dilanda air banjir, memandangkan keadaan-keadaan bahaya yang wujud pada malam itu. Langkah mencegah yang ditetapkan 'adalah perkara yang begitu diperlukan hinggakan adalah kesilapan bodoh' untuk defendan mengabaikan kewajipan menyediakan langkah mencegah sedemikian. Maka, defendan patut dipersalahkan. Oleh kerana kecuaian sertaan tidak diplid, defendan bertanggungjawab secara keseluruhan (lihat ms 772F–I, 773A–G dan 774F–H); *Morton v Wiliam Dixon Ltd* (1909) CS 807, *Paris v Stepney Borough Council* [1951] AC 367 dan *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 diikut.

(3) Common law, yang merupakan undang-undang tidak bertulis, tidak dirangkumi oleh perkataan-perkataan 'mana-mana undang-undang bertulis lain' seperti yang diperuntukkan dalam s 42 Akta tersebut. Maka, tuntutan untuk ganti rugi khas di bawah common law oleh plaintif bukanlah manfaat yang serupa di bawah 'mana-mana undang-undang bertulis lain' dalam lingkungan maksud s 42 dan justeru itu tuntutan boleh dikekalkan meskipun terdapat s 42 (lihat ms 775D–G).]

Notes

For a case on social security, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1038.

For cases on negligence, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 315–852.

Cases referred to

Carmarthenshire County Council v Lewis CC [1955] AC 549 (refd)
Cavanagh v Ulster Weaving Co Ltd [1960] AC 145 (refd)
Donoghue v Stevenson [1932] AC 562 (refd)
Ellis v Home Office [1953] 2 All ER 149 (refd)
Johnson v Rea Ltd [1962] 1 QB 373 (refd)
Morton v William Dixon Ltd (1909) CS 807 (refd)
Paris v Stepney Borough Council [1951] AC 367 (refd)
Sambu Pernas Construction & Anor v Pitchakkaran [1982] 1 MLJ 269 (refd)
Tan Choon Seng v Yang Kam Hah [1971] 1 MLJ 175 (refd)

Legislation referred to

Employees' Social Security Act 1969 s 42
Employees' Social Security (Amendment) Act 1992
Workmen's Compensation Act 1952

R Siva Dharma (*Matthew Thomas & Co*) for the plaintiff.
Vijaya Segaran (*Maxwell Kenion Cowdy & Jones*) for the defendant.

Cur Adv Vult

Peh Swee Chin FCJ: But for two remarkable features, this action, the evidence and submissions of which concluded on 13 July 1996, would have been an ordinary claim for damages for personal injuries sustained due to some alleged negligence of the defendant. One of the features is that the negligence complained of is basically, not in commission of any act of negligence but in negligent omission to do some act or acts. The other feature is that the defendant was a co-employee of the plaintiff at the time of accident in question. I will deal with them at some length later.

According to the statement of claim, the plaintiff was a worker at the tin mine in question at the material time when he was instructed by the defendant, a co-worker, to build an embankment to prevent rising water from flooding the mine when the mine wall subsequently collapsed resulting in serious injuries to the plaintiff due to the negligence of the defendant, the co-employee.

Particulars of negligence of the defendant are alleged to be, inter alia, failure 'to take any or adequate precautions for the safety of the plaintiff'; 'in exposing the plaintiff to a risk of damage or injury of which he knew or ought to have known'; 'instructing the plaintiff to build the bund with a tractor when the defendant knew or ought to have known the impending landslip or caving in of the mining wall', etc.

By an 'amended statement of defence', for short, the defendant alleges that he himself received instructions from his employer to increase the height of an existing bund and he did just that with the assistance of the plaintiff, admittedly a co-employee. The defendant further says by way of defence, that the plaintiff, being an insured employee under the

A Employees' Social Security Act 1969, is barred by s 42 of the Act from claiming damages.

The amended defence does not raise the defence of contributory negligence or any other defence apart from what has been stated above. The statement of claim refers to the 'building embankment' and 'mine
B wall'. It has not been disputed in evidence, and it is manifest from evidence that building an embankment is in fact increasing the height or level of the bund of the mine and the mine wall in fact similarly refers to the bund. The Employees' Social Security Act 1969 will be hereafter referred to throughout as 'the Act'.

C To summarize the plaintiff's evidence, he said he was working for Chai Kim Kong & Sons Sdn Bhd, the owner of the tin mine in which he was one of 'kepalas' (it is undisputed evidence that there were more than one 'kepala' at the mine). The defendant had been the manager of the mine for about five years. The person in control of the said registered company had been visiting the said mine almost every day but it was the
D defendant who gave instructions to the kepalas and workers at the mine.

According to the plaintiff, it had started raining at about 2pm on the day in question and it rained continuously until the time when the unfortunate accident took place when he was seriously injured at about 8.10pm on the same day. It had been raining quite heavily.

E After dinner that day, he went to the mine and saw water in the mine pit rising, the water having overflowed from other areas; he then informed the defendant. The defendant took him in a landrover to the kongsi house where the defendant told him to drive a tractor from there 'to do the work' in connection with the said rising water. The defendant himself took out another tractor to the mining area.

F The plaintiff then proceeded to the bund where there was flood water. One side of the bund was the mining pit and the other side an (existing) mining pool. He started doing work by increasing the level (ie height) of that part of the bund where there was flood water 'rushing' over the bund and into the mining pit. He said he was instructed (earlier) by the
G plaintiff to increase the level of the bund, otherwise the mine would be flooded. It was dark and there were no lights there except for the lights of the old tractor he was driving. Such lights could reach up to about 20ft from the rear and from the front of the tractor. The defendant's tractor was on the bund and closer to the kongsi house than the plaintiff's tractor.
H The bund was built of sand and it was broad enough for a lorry or tractor to be driven on it. His tractor weighed about 10 tons.

The plaintiff increased the height of the bund by taking sand from the side of the mine and putting it on top of the bund with his tractor. While he reversed his tractor to get more sand, the bund collapsed. The tractor fell into the mining pit of the mining area. He fell about 10ft from
I the top and he was pinned down by the tractor he drove. He shouted for help. A co-worker called Ramli and four other workers came to rescue him.

He said that the condition under which he worked at the time of accident was dangerous; he meant it was unsafe because it was raining

heavily, the soil was soaked with water and there was flood water there. He said if he did not follow the defendant's instruction to do the work, he would be sacked. He said it was risky to work in the rain because of the lightning, landslide and the ground was slippery. If the mine was flooded, it would be closed. The defendant instructed him to do the work and he had the authority to so instruct. A

He sustained injuries to his right leg and right hand. He showed the court the leg injury by exposing his leg which was seen to be somewhat bent and scarred. His salary at the time was RM512 per month. After the accident, he was given two months' salary and he stopped work for five years and eight days. He resumed work on 22 October 1987. He could not resume work earlier because of his injuries. Up to the time of giving evidence, he still had to attend the clinic. B C

When he thus resumed work, he did work for various firms at salary higher than RM512 per month and he went on to give details of them. He could still drive a tractor because the tractor's foot brake was for one's left leg to apply and he could use his (uninjured) left leg. The tractor had no clutch but a gear stick. D

He was admitted to the General Hospital, Ipoh and later he was admitted to the Fatima Hospital (a hospital run by Christian mission). He spent a total of RM15,000 on medical expenses.

In cross-examination, he said he was a licensed tractor driver and the tractor he drove that night was used for scooping up earth and bringing it onto the bund. He was a head kepala for Palong No 3. He said he had worked for 17 years and was made one of the palong kepalas three months before the accident. In the absence of the defendant, he was in charge of Palong No 3's workers. He had not much experience and could only act on instructions of the defendant. He said he was instructed by the defendant to see if the mine was flooded. When it rains, water pumps would be used to pump out water. During heavy rain, the water pumps would not be enough and they would have to use other measures such as building bunds. There was a road leading to Palong No 3; the road was built of sand and stones. The sand and stones would be washed away during heavy rain. On the day of the accident, there were only three shifts without night shift, and for night shifts, the mine hole would be lit up. A tractor has lights as bright as those of a motorcar and has two bright lights like headlights at the rear. E F G

He did not go to the bund at first; but he then saw a lot of surface water going into the mine hole, where the defendant was. He then told the defendant who went with him to see the bund to find out (the source of water). He was taken back by the defendant in a landrover. He did not know that the width of the bund was about 40ft and a vehicle could pass on it. He denied that the defendant, on being informed by him of the flood water asked him (merely) to go to see the bund (ie the part of the bund in question). Though the water was overflowing the bund, vehicles could still pass on it. He said the defendant did instruct him to raise the height of the H I

A bund. He said he and his employer (ie the said registered company) were contributors to SOCSO (ie the Employee Social Security Organization run by the Ministry of Labour). He said he was told by the defendant to look for the place where the water came from (which water was going into the mine hole) and to stop the flow of water.

B The next witness is Ramli bin Yub Ismail, called by the plaintiff, and he was a controversial one. He gave evidence touching on the accident about having seen the plaintiff being picked up by the defendant in the defendant's landrover which proceeded to the kongsi house where the plaintiff and the defendant each took out a tractor and the tractors proceeded to the bund road. Later, he helped rescue the plaintiff from the mine hole.

C In cross-examination, he was reminded that he had been interviewed by Dato' NT Rajah (DW2) (leading partner of the firm of solicitors acting for the defendant). He could not remember if he had told Dato' Rajah that he did not see the plaintiff or the manager (the defendant) at the place of accident that night prior to the accident.

D The defence subsequently called DW2 who produced a statement taken from Ramli in the form of a statutory declaration which Ramli refused to sign before a commissioner for oaths (exh D3). In D3, Ramli said he could not remember seeing the plaintiff and defendant on that day prior to the accident.

E I might just as well mention here that I accept wholly the evidence of DW2 that Ramli did tell him what was recorded in D3. I reject Ramli's evidence in court.

The defendant in his evidence said he was in the employ of Chai Kim Kong & Sons Sdn Bhd, the owner of the tin mine. He was the manager of
F the mine as well as a director of the registered company. There was no work involving tractors at night, and the mine had three loaders and three excavators — they were all called tractors — but the plaintiff drove only the loader. There were three 'palongs' each of which comprised a 'head kepala', two 'shift kepalas' and the mine workers. The plaintiff was a head kepala for Palong No 3. The three head kepalas would have to look after
G the safety of their workers.

On the day in question, while the defendant was working at about 5pm in the mine hole, the plaintiff came to see him telling him that water was overflowing the bund into the mine hole. All he said in reply to the plaintiff was to ask the plaintiff to have 'a look' at the place where such
H water overflowed. He said in court that by saying 'to have a look', he meant that the plaintiff was to do anything that was required. He then saw the plaintiff drive a loader to the place where water overflowed and also saw the plaintiff increasing the height of the bund there. He also later drove another loader to where the plaintiff was doing the actual work of increasing the height of the bund.

I He said the bund was about 4ft high and 40ft wide and it also served as a road for vehicles to pass on it. Raising the bund was not considered dangerous by him and there was no other way to stop the overflow of

water. The plaintiff worked on his own initiative. Between 6pm to 7pm, the heavy rain which had been falling had become a drizzle. The defendant said he was himself successful in stopping the overflow of water on his part of the bund with his own loader.

At about 7.30pm, it was dark and he did not see lights of the plaintiff's loader. He found that the plaintiff's loader had fallen into the mine hole and the plaintiff was shouting for help. He went to call other workers to help rescue the plaintiff. He did not instruct the plaintiff to drive a loader that day. He did not at any time on that day drive a landrover (ie contrary to the evidence of Ramli above-mentioned about the defendant picking up the plaintiff in the defendant's landrover to fetch the loader), for when it rained, a landrover could not be used. On the next day after the accident, he found that the flood water had come from a mining hole nearby when its own bund collapsed.

In cross-examination, the defendant said on the day in question, it had started to rain from about 2pm until the time when the accident took place. At the time when the accident happened, the heavy rain had become a drizzle. He agreed that Malim Nawar (the small mining town in which the mine was situated) was itself flooded. The accident took place about 8pm.

He said the bund was made of sand and there were no lamps on the bund. It was dark. The plaintiff was getting sand with his loader. The loader had fallen for about 500ft into the mine hole. It was sent down by sand and water.

He himself did not help in actually rescuing the plaintiff because the situation was dangerous. He said if the height of the bund was not raised, the mine would have been flooded, causing the mine to have to be shut down for one week. Raising the height was to ensure the safety of the workers.

He said when it rained heavily for a couple of hours, there would be danger of landslides and the ground would be slippery. The situation that night was not dangerous. He meant — when he asked the plaintiff to have 'a look' — that the plaintiff should stop the overflowing of water. When he saw him drive a loader, he knew the plaintiff was going to raise the height of the bund. He could not stop the plaintiff from going there as he was too far from the plaintiff. Later, he said he did not stop him doing the work. He did not instruct the plaintiff to raise the height of the bund. He did not agree that he had exposed the plaintiff to danger or that he failed to take care of the plaintiff's safety, or that the condition under which the plaintiff was working was unsafe and dangerous.

On liability, it was submitted for the defendant as follows.

The claim herein was a claim by a person against his fellow employee and para 2 of the defence had admitted it.

It was submitted to the effect that the defendant had not breached the duty of care in this case, for the plaintiff had to take risks which were part and parcel of the job of a mine worker. Further the defendant, being

A a manager of the mine took instructions also. The plaintiff was further a very experienced tractor driver and one of the head kepalas.

It was submitted that there was an overflow of water over the bund 4ft high and 40ft wide. The only way to stop it was to raise the height of it.

It was further submitted that the defendant merely told the plaintiff B to have a look at the place where the water overflowed; he did not specifically tell the plaintiff what to do. The plaintiff, being a head kepala, did not have to be given instructions. The plaintiff naturally took a loader to do the job.

It was submitted that the plaintiff had failed to keep a proper look C out, because the accident happened as he was reversing his loader or tractor, and it was not safe to do so. The bund collapsed and after this, his loader fell into the main hole.

It was submitted that the defendant could not be expected to stop the workers from working that night as there was no dangerous situation, the heavy rain and a bund made of sand would not present a dangerous D situation. Though it had rained from 2pm to 7pm, the heavy rain had become a drizzle at the time of accident. The plaintiff never objected to do what he did later.

It was submitted that the evidence of PW2, ie that of Ramli, should not be accepted by the court.

E In reply, on liability, it was submitted for the plaintiff as follows.

It was submitted that the situation was dangerous because it was dark when the accident took place at 8pm. The tractor of the defendant weighed 10 tons and the defendant was working with the tractor on the bund made of sand. The defendant himself did not even attempt to rescue F the plaintiff as the situation was dangerous.

It was submitted that if the bund was not raised, the tin mine would be flooded, and if it was flooded it would close for one week.

It was submitted further that the defendant himself had admitted that when it rained, the workers were likely to be exposed to the danger of G landslides, and the defendant said when it rained heavily it would be dangerous for workers to work.

It was submitted that by telling the plaintiff to have a look, the defendant meant that plaintiff was to stop the overflow of water, and the plaintiff said he would be sacked if he did not obey the defendant. Further, H the defendant did not stop the plaintiff from taking the loader and from using the loader on the bund to stop the overflow of water. The defendant had admitted also that work involving the tractor was not usually done at night.

It was also submitted that the failure of the defendant to stop the I workers from working was negligence. Further, contributory negligence was not pleaded by the defendant.

Dealing with the question of liability, it will be necessary for the court to comment on the defence that the claim of the plaintiff is barred by s 42

of the Act. The short answer is that the plaintiff is not claiming against his employer, the registered company aforesaid, but a fellow employee. If he claims against his employer, undoubtedly such claim would be indeed barred by the Act. A claim against a fellow employee was held by the Federal Court in *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269 not to have been barred by the Act. A

There was a subsequent amendment to the Act barring a claim, this time, against a fellow employee. This amendment is contained in the Employees' Social Security (Amendment) Act 1992, which came into force on 20 February 1992, but the accident took place and the action herein was filed, both long before the date of 20 February 1992. This defence though asserted in the amended statement of defence was practically and correctly abandoned at the trial, and the defence without the benefit of the amendment must collapse in the face of *Sambu Pernas*. B C

On another defence that the manager was himself acting on instructions, when he asked, though not in so many words, the defendant to increase the height of the bund, it being the only way to stop the overflow of water, such defence might be useful for some purpose, but it would not be relevant on the question of his liability to the plaintiff, for that liability would depend on what he did to or failed to do for the plaintiff. D

I will now deal with the evidence by applying some general principles relevant to it with a view to seeing whether a case has been proved by the plaintiff against the defendant as alleged in the statement of claim of the plaintiff. E

Very generally, inter alia, in connection with negligence, the general duty of care is that one must take care not to cause injury or damage to one's neighbour (neighbour as explained in *Donoghue v Stevenson* [1932] AC 562). F

On the other hand, the law does not impose a general duty of care to save the neighbour from such injury or damage for which one is not responsible, save in one exception. Barring the exception, and carried to its logical conclusion, it has been said that a bystander can watch a small child drown in one foot of water without doing anything to save the child, and yet he will not have incurred any civil liability for damages, though he will be, of course, roundly condemned by all right thinking-members of society and will have to be answerable to God in due course. The law has never imposed a duty on anyone to be a 'do-gooder' or a good Samaritan. G H

One observes in this connection that after a great deal of fine tuning of the law in courts, over the years, the connection between the law and morality has become less and less apparent.

To continue, the exception above-mentioned is when there is a special relationship between the parties (independently of any contractual relationship of course), where the law will impose such a duty of care in regard to such failure or neglect to save one's neighbour from injury or I

damage even where one is not responsible for such injury and damage to such neighbour.

When such special relationship arises, the law will impose a duty of care of a special kind, it being a duty to act affirmatively to protect the neighbour or plaintiff from such injury or damage. Such duty to protect the plaintiff, or for that matter, such special relationship arises, it appears, from certain situations when, eg the defendant is responsible for placing the plaintiff in a position in which it is forseeable that the plaintiff may be injured; or where the plaintiff creates a danger, even though innocently, he has failed to take steps to remedy or prevent it, see *Johnson v Rea Ltd* [1962] 1 QB 373 (about slippery floor causing a fall). The situations just stated are not conclusive, but any other situation, to give rise to such special relationship ought to be of a similar nature, the essence being on danger.

Thus, generally speaking, in other words, when any such situation exists to give rise to such duty to protect the plaintiff, the special relationship between the plaintiff and the defendant comes into being. Such special relationship has been held to arise in a good number of cases, just to give some other examples, eg between a carrier and a passenger; and in *Ellis v Home Office* [1953] 2 All ER 149 (about assault on a fellow prisoner). There was *Carmarthenshire County Council v Lewis CC* [1955] AC 549 about a four-year old boy of a nursery school under the management of the local authority, running onto a public highway in the temporary absence of the teacher, causing a fatal accident to some driver who tried to avoid the boy.

Lastly, in regard to the standard of the duty of care imposed by law on a defendant in connection with the duty to protect the plaintiff, from such actionable omission, it is equivalent to or is demonstrated by what the plaintiff has to prove, according to a test laid down by Lord Dunedin in *Morton v Wiliam Dixon Ltd* (1909) CS 807 at p 899: 'either: (a) to show that the thing the defendant did not do was a thing commonly done by other persons in like circumstances; or (b) to show that it was a thing which was so obviously wanted that it would be a folly in anyone to neglect to provide it'. In so showing, the obviousness stated above must be such as appears to a prudent and reasonable man, see *Paris v Stepney Borough Council* [1951] AC 367 at p 382 which approved and adopted the dictum of Lord Dunedin. The word 'folly' above-mentioned refers to something which is imprudent or unreasonable, see *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 at p 162 in which both *Morton* and *Paris* were approved.

The court may just as well mention here, if it is of some help, that on a given set of facts which attract the operation of the above principles, a plaintiff may sue, of course, on the basis of such principles, but he may be able also to sue concurrently or in the alternative, on the basis of some other specific tort involving sometimes substantially similar principles, such as an occupier's liability to an invitee or licensee, etc. Overlapping of the laws exists in many fields.

To revert to the evidence and bearing in mind the applicable general principles stated above, I am satisfied that there was fairly heavy rain on that day from 2pm right up to about 8pm when even the mining town of Malim Nawar in which the mine was situated was partially flooded. I am further satisfied that there was flood water overflowing the bund and into the mining hole of the tin mine in question, and the plaintiff informed the defendant who was his superior at the mine, and the defendant had told him to remedy it by asking the plaintiff to go to the place where the water overflowed 'to have a look' at it. I am satisfied, all on balance of probabilities, that by saying so to the plaintiff, the defendant meant that the plaintiff should increase the height of the bund, and this is fortified by the defendant when he saw the plaintiff took a 10-ton tractor to carry out the work on a bund with overflowing water, in darkness save relieved somewhat by the lights of the plaintiff's tractor. The defendant never took any steps to stop the plaintiff from taking a tractor to go there; he had every opportunity to do so if he wanted, while in fact, he wanted the plaintiff to do the work in question with a tractor, such work being work not done usually at night. The plaintiff wanted to save the mine from being flooded and being closed consequently for about one week if it was flooded. Loss of profit was regarded by him as more serious than danger to life.

In the circumstances, I think with reference to some of the particulars of negligence alleged by the plaintiff in the statement of claim, that the defendant, on that night had indeed failed to take any precaution: (a) for the safety of the plaintiff; (b) for exposing the plaintiff to risk of injury of which the defendant knew or ought to know; and (c) such precaution consisting of not instructing the plaintiff to increase the height of the bund when he knew or ought to know of any probable landslide.

Facts in this case could quite naturally constitute the situation that gives rise to a special relationship between the plaintiff and the defendant. The plaintiff — being under the control of the defendant, the mine manager — had to be on duty at the mine that night and was in a position that was foreseeable that he might be injured.

I further hold more specifically that the defendant had failed to take the said precaution in the following ways: (a) by failing to ask the plaintiff to stop work; and (b) by failing to tell the plaintiff not to drive a tractor there to raise the height of the bund over which flood water flowed, in view of the conditions of great danger there prevailing that night as set out above. Such specified precaution 'was a thing which was so obviously wanted that it would be a folly' for the defendant to neglect to provide such precaution. I find the defendant liable.

Contributory negligence not having been pleaded, I find the defendant wholly liable. If contributory negligence had been pleaded, it would have been futile for it was held in *Tan Choon Seng v Yang Kam Hah* [1971] 1 MLJ 175, that it did not amount to contributory negligence for the plaintiff in that case to continue to work despite the rain for the benefit of the business of the defendant.

A On the question of quantum, both parties have agreed at the amount of RM15,028 as medical expenses incurred by the plaintiff but liability was disputed by the defendant on two grounds; one of which was based on s 42 of the Act, which provides as follows:

> When a person is entitled to any of the benefits provided by this Act, he
B shall not be entitled to receive any similar benefit admissible under the provisions of any other written law.

The plaintiff had admitted in evidence, vide p 17 of the notes of evidence that he was a contributor to 'SOCSO' together with Chai Kim Kong & Sons Sdn Bhd in respect of what appears to the court to be meagre
C accident benefits and other benefits for the plaintiff himself according to the manner of the Act.

The plaintiff now claims under common law. Common law is unwritten law, while any statute is written law. Unwritten common law, though it does not derive from any express declaration of the will of the legislature, has the same force as a statute; it is law as declared by judges.
D

Common law therefore does not fall within the words 'any other written law'. Such literal interpretation does not give rise to any absurdity or repugnancy especially having regard to the claim here being a claim against a fellow employee, the maintainability of such claim having been repeatedly asserted by the Federal Court, see eg *Sambu Pernas*. The object
E of the Act (until the Amendment Act) seems, inter alia, to provide benefits such as accident benefits in any event for employees and also to protect employers against excessive claims from employees in court but not in respect of of fellow employees.

I am of the view therefore that the claim for special damages at
F common law of RM15,028 as medical expenses is not a similar benefit under 'any other written law' within the meaning of s 42 set out above; the claim is sustainable despite s 42 aforesaid. On reflection, s 42 could have very well have been designed to aim at such written law as the Workmen's Compensation Act 1952.

G The other ground for disputing liability is that half of the medical expenses was incurred in Fatima Hospital instead of the Ipoh General Hospital. Fatima Hospital is a private hospital run by a Christian mission and I have every reason to believe from my six years as a resident judge in Ipoh, it has never aimed to make profit for the sake of making profit and though it is a private hospital, it is actually closer to being a charitable
H institution. Fatima Hospital is a poor man's second choice of hospital in Ipoh being unlike one of those expensive private hospitals. I do not think therefore I need to delve further into question of reasonableness of his getting treatment at a private hospital.

The sum for medical expenses aforesaid is therefore allowed, excluding
I travelling expenses of out-patient treatment which will be dealt with later.

As for the injuries, he had compound fractures of the right tibia and fibula with part of the tibia bone missing. He had also fracture of head of

radius and dislocation of the right elbow joint. He was admitted to the Ipoh General Hospital on 15 October 1982 and discharged therefrom on 26 December 1982 and admitted to Fatima Hospital on 30 December 1982 and discharged therefrom on 10 February 1982 undergoing a total of four major operations of the leg with some resulting shortening the extent of which was not specified by the hospital. The shortening for such non-specifying will be regarded therefore by the court as almost negligible. He has marked weakness in the muscles of his right lower limb with stiffness in the right ankle joint. I would award RM35,000 for pain and suffering in respect of his leg injuries and resulting permanent disabilities. I would further award RM12,000 for the arm injury, having taken into account the overlapping effect.

For pre-trial loss of earnings, the plaintiff did not work for five years after the date of accident. Five years is a long time, and I would for assessing total loss of past earnings, adopt a period of four years for physical inability to work, and notionally, and realistically too, he could have sought and obtained employment for the fifth year getting much lower wages, probably. He could have earned, let's say, about half of the wages he was earning at the time of accident, ie half of RM512 per month for the fifth year.

Pre-trial loss of past earnings should be RM512 per month for four years, amounting to RM24,576 and for pre-trial partial loss of earnings at RM256 per month for one year amounting to RM3,072.

When plaintiff resumed work after the said five years, he earned more than RM512 per month and increasingly so as time went on. There should be no award for loss of future earnings.

As for claim for loss of earning capacity, it cannot be awarded to substitute loss of future earnings where the latter is not justifiable by evidence. However, as a mining worker for many years, he did not seem to have done any other type of work, and with the mining industry being on an irretrievably sharp decline, there is a residual risk, I am satisfied, that the plaintiff will find himself somewhat handicapped to get work that would give him a good income as a mining worker, what more with the weakness of the right leg, stiffness of the right ankle and some slight shortening. I award a sum of RM10,000 as damages for loss of earning capacity.

I allow RM15 per trip for 50 trips in connection with out-patient treatment totalling RM750 and RM40 being cost of medical reports.

It was argued by learned counsel for the defendant that interest on general damages should be reduced from the usual 8%pa to 5%pa as the accident took place in 1982 while the action was only filed in 1983. Learned counsel for the defendant explained it with reference to the long stay in hospital. I find such explanation totally acceptable.

I give judgment for the sum of RM57,000 comprising damages for injuries and loss of earning capacity, by way of general damages and RM43,466 comprising pre-trial loss of earnings, medical expenses, travelling expenses and cost of medical report, by way of special damages.

I further award interest at 4%pa on the special damages from date of accident to date of judgment, and thereafter at 8% till date of satisfaction. I also award interest at 8%pa on the general damages excluding the sum of RM10,000 for loss of earning capacity, from date of service to date of judgment and thereafter at also 8% till date of satisfaction. I also award costs of action to the plaintiff.

Order accordingly.

Reported by Keith Kwan